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In the Supreme Court
of the State of Utah

FILED

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KAREN ANDERSON FAHEY,
Plaintiff and Respondent,

vs.

WILBUR J. C. FAHEY,
Defendant and Appellant.

Clerk, Supreme Court, Utah

No. 8373

BRIEF OF APPELLANT

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In the Supreme Court of the State of Utah

KAREN ANDERSON FAHEY,

Plaintiff and Respondent,

vs.

WILBUR J. C. FAHEY,

Defendant and Appellant.

No. 8373

BRIEF OF APPELLANT

INTRODUCTION

This is an appeal from a judgment entered by District Judge Joseph G. Jeppson awarding a divorce to plaintiff against the defendant. Plaintiff was awarded custody of the minor children of the parties and was also awarded the use of the home belonging to the plaintiff and defendant, the furniture and fixtures therein and the automobile owned by the parties. The defendant resisted both the granting of the divorce and the disposition of the property.

STATEMENT OF FACT

It is difficult to make a concise yet fair statement of the

facts in this case because of the sharp conflict between the inferences and innuendos made by the plaintiff in her direct testimony and the admissions which she made on cross-examination. The testimony of the defendant is also at variance with the direct testimony of the plaintiff. However, because on appeal it is necessary for the Court to draw inferences from the evidence most favorable to the party prevailing below, counsel for the appellant will in this Statement of Fact, attempt to restrict the statement to the facts that can be gleaned from the testimony of the plaintiff on both direct and cross examination. However, only from a reading of the complete transcript in the case is it possible to gain an accurate picture of the circumstances under which this marriage began, existed and ended.

In November of 1947 the plaintiff, then an unmarried woman, went on a Mission for the Latter-day Saints Church to the Hawaiian Islands (27). While there she experienced considerable difficulty in getting along with her associates, particularly the Mission President, E. Wesley Smith (34). The defendant, who was at the time not a member of the L.D.S. Church, was employed in the Hawaiian Islands as a radio technician (73). He was at the time a widower, his first wife having died in 1946, leaving a child, Susan, who in 1947 was approximately 6 years of age (74). The defendant became interested in the L.D.S. Church and at the meetings held by the missionaries in the Hawaiian Islands which he attended, became acquainted with the plaintiff. Some time later at a ceremony attended by the plaintiff, the defendant was baptized a member of the church (33).

The two became interested in one another and carried on a courtship mostly by letter (35). It appears that at no time during this courtship did they overstep the bounds of propriety in view of the ecclesiastical position of the plaintiff at the time. The two were married in the Hawaiian Islands on October 9, 1948, (2) the plaintiff having been granted a release from her Mission immediately before the marriage ceremony (34).

The plaintiff testified that she never did love the defendant (34) but was forced into the marriage by the Mission president because he was irritated with her and wished to be rid of her as a missionary. She further testified that not having loved the defendant, she then proceeded to hate him from the day of the marriage on because of the fact that physical relationship with him was distasteful. Her testimony in this regard is as follows (37):

“From the first day after I married him, the way he physically and sexually treated me I hated him from that day on until this day.”

A short time before the marriage, the defendant had brought his daughter by his former marriage to the Hawaiian Islands (35). She had previously been residing with his mother in the United States. The couple lived on the Islands with the child Susan until April of 1949 when the defendant's contract with Radio Corporation of America terminated, when they moved to Salt Lake City, where they made their home (73).

For a short time they resided with the plaintiff's grandmother, but after some two months located and moved into an apartment of their own (75). The defendant at first had some

difficulty finding lucrative employment in Salt Lake City. In the Islands he had been earning approximately \$600.00 per month. The first job which he secured in Salt Lake City paid him only one-third of that amount (75). As a result he secured an additional job and worked a total of approximately 18 hours a day for a period of time (75-51). The plaintiff also secured employment, which she retained up until the time their baby was born in 1954 (76). The defendant later secured a better job working as a full time employee of the Utah State National Guard (75) and the couple purchased themselves a home in Salt Lake City (76).

At the beginning of the Korean War, the defendant was inducted into active service with the balance of the Utah National Guard (76). He was first sent to a station in the State of Kansas where, after a period of some months, the plaintiff and the child Susan joined him (76). The plaintiff found employment in Kansas and stayed there on the job which she had after the defendant was sent overseas (77).

After the defendant's discharge from the service, both the plaintiff and the defendant and the child Susan returned to Salt Lake City where they moved into the home which they formerly purchased and which had been rented while they were away (77). They continued to reside in this home until a child was born to them on July 17, 1954. Within three weeks after the child was born, plaintiff left the defendant (83) and shortly thereafter instituted proceedings for divorce.

During all the period of their married life the plaintiff handled the finances of both of the parties, she keeping her own earnings and he turning over to her his paycheck (36).

She would then pay the bills and would return to the defendant enough for him to pay his tithing and for his incidental spending money. She complained bitterly about the amount of money spent by the defendant. She complained because he spent money on his hobby, which was radio, in an amount varying between \$5.00 and \$25.00 per month (53). She complained because he spent \$220.00 over a period of some one and one-half years for flying lessons (52), which the defendant testified he regarded as desirable to improve his standing in his profession (79). She complained because on occasion the defendant bought lunch for male friends (53), although the defendant testified that these occasions were so few that he was embarrassed in light of like favors which he received from his associates at work (79). Plaintiff belittled the defendant because during the period prior to their marriage while he was working in Hawaii he had saved no money from his earnings (50). Yet the evidence shows that while the defendant was overseas, the plaintiff, while receiving her own earnings, \$140.00 a month allowance from the defendant's pay and \$80.00 per month rental from their Salt Lake house, saved nothing at all and in fact partially dissipated a bank account of \$500.00, which the defendant had established by borrowing shortly before he went overseas and had paid back, not out of the allotment to the plaintiff, but out of the small amount retained from his earnings (78) (Ex. 7).

Plaintiff further complained that on two occasions, one in 1949 and one in 1950, the defendant struck her (30). However, she admitted that no such thing had occurred in the last four years of their married life together (31). In regard to the

striking incidents, the defendant recalled one of them, but could not recall the other. In regard to the one he did recall, he described the circumstances under which it had occurred and the provocation therefor, and further testified that he was immediately sorry and ashamed of what he had done, and the couple made up their differences the next day (85-86).

Plaintiff further complained that the defendant at times, when his temper was aroused, would shout at her and the child Susan. Her principal complaint against him throughout, however, appears to have been that he would engage in sexual intercourse with her at times when she did not desire such association, and also that she felt he was unduly severe in his discipline of the child Susan, who subsequent to the marriage had been adopted by the plaintiff.

In the year 1953 (65) the plaintiff's mother, who had previously been residing in the State of Washington, returned to Salt Lake City to live. Her association with the couple appears to have been very close and from that time on the marriage disintegrated rapidly (81-82).

For a number of years after the marriage plaintiff had been unable to have children which she testified she wanted very badly (40). Although she claims that at the time she was constantly and consistently hating her husband, she submitted to a major operation and other less severe but rather extensive and painful treatments in an effort to establish her fertility (41-42). She finally became pregnant and had a child on July 17, 1954. Shortly after the child was born, plaintiff went to her grandmother's house to stay for a short period and the plaintiff's mother came down to keep house for the defendant

and the child Susan (62). One night while this arrangement was in progress, the defendant chastised Susan for disobeying him. The facts surrounding this incident are confused and the evidence conflicting, Mrs. Fahey's mother testifying that the defendant was unduly severe and slapped the child in the face leaving welts on her face (64). The defendant, on the other hand, described the incident as being a necessary chastisement for a child who, because of the unstable family life which she had experienced, was rebellious and in fact bordering on delinquency (84-85). At any rate the plaintiff's mother the next day reported the incident to the plaintiff, who was staying at her grandmother's house. The plaintiff thereupon filed suit for divorce and obtained a restraining order alleging that she feared that the defendant would do great bodily harm to herself, to the child Susan and to the baby. Notwithstanding this allegation two days later when she wanted to do some shopping and to be relieved of the care of the baby, she voluntarily left him alone with the defendant for a full afternoon (46).

Further facts will be hereinafter discussed in connection with the points to which they are applicable.

STATEMENT OF POINTS ON APPEAL

POINT ONE

THE COURT ERRED IN REJECTING DEFENDANT'S EXHIBITS 1, 2, 3, 8, 9, 10, 11, 12, 13, 14 AND 15.

POINT TWO

THE COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO PROVE THAT THE PLAINTIFF

WAS CONFINED IN A SANITARIUM A SHORT TIME BEFORE THEIR MARRIAGE.

POINT THREE

THE COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO CALL DRS. HORNE AND KIRK TO TESTIFY REGARDING THE MENTAL ILLNESS OF THE PLAINTIFF, AND PRESIDENT E. WESLEY SMITH TO TESTIFY REGARDING THE CIRCUMSTANCES SURROUNDING THE MARRIAGE OF THE PLAINTIFF AND DEFENDANT.

POINT FOUR

THE COURT ERRED IN GRANTING A DIVORCE TO THE PLAINTIFF FOR THE REASON THAT THERE WAS INSUFFICIENT EVIDENCE TO WARRANT A FINDING OF CRUELTY.

POINT FIVE

THE PROPERTY SETTLEMENT ORDERED BY THE COURT IS INEQUITABLE AND UNJUST.

ARGUMENT

POINT ONE

THE COURT ERRED IN REJECTING DEFENDANT'S EXHIBITS 1, 2, 3, 8, 9, 10, 11, 12, 13, 14 AND 15.

The plaintiff testified that the marriage was entered into by her reluctantly largely because of the pressuring of the

defendant and of President E. Wesley Smith of the Hawaiian Islands (34). This matter is important because the court in comments made at the time the decision was rendered stated that the plaintiff was to some extent excused from her admittedly improper conduct during the marriage by the fact that the marriage got off to a bad start from the fact that there had been no normal courtship preceding it (98-99). The defendant's testimony was to the contrary to the effect that while the courtship was necessarily restrained because of the plaintiff's ecclesiastical position, there was definitely love and affection between the parties and the marriage was one which was as much or more of the plaintiff's making than anyone else (80).

The defendant offered in evidence eleven letters written by the plaintiff to the defendant in the months immediately preceding their marriage. These letters express in the most endearing terms the plaintiff's love for the defendant and her desire to become his wife. A reading of them could not help convince an impartial observer that the plaintiff's testimony as to the circumstances under which the marriage was entered into was absolutely false. The Court refused to accept these letters in evidence, stating at the time that it was immaterial to the case under what circumstances the marriage was entered into and that in any event the plaintiff's story as to the circumstances did not inure to her benefit. This is certainly inconsistent with the later statements of the court to the effect that the plaintiff was, to some extent, excused from her breach of the marriage covenant by the fact that she had not entered into it under normal circumstances.

POINT TWO

THE COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO PROVE THAT THE PLAINTIFF WAS CONFINED IN A SANITARIUM A SHORT TIME BEFORE THEIR MARRIAGE.

The defendant offered to prove that after being sent on her Mission to Hawaii and within the year preceding the marriage, the plaintiff had quarreled violently with her missionary companions and as a result of one quarrel had become so emotionally upset that she was for a period of time confined to a mental sanitarium for mental treatment (28). This offer of proof was rejected by the Court. Such evidence appears clearly to have been competent. The Court made the statement at the time he announced his findings that the emotional stability of the wronged party would be taken into consideration in determining whether or not the actions of the other party were sufficient to constitute cruelty. Certainly if this is true, then the corollary would be true that the amount of provocation and the problem with which the defendant had to deal should have been taken into consideration in determining whether or not the actions of the defendant were such as to warrant censor or blame on his part. While a husband should undoubtedly make certain allowances for any mental illness on the part of his wife and attempt to adjust himself to them, it is also true that a husband dealing with an emotionally unstable wife is presented with problems that a husband with a normal wife does not have and he may have to do things in order to keep the marriage riding smoothly which would not be necessary where the wife is well adjusted mentally and emotionally. Rejection of this evidence was clear error.

POINT THREE

THE COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO CALL DRS. HORNE AND KIRK TO TESTIFY REGARDING THE MENTAL ILLNESS OF THE PLAINTIFF, AND PRESIDENT E. WESLEY SMITH TO TESTIFY REGARDING THE CIRCUMSTANCES SURROUNDING THE MARRIAGE OF THE PLAINTIFF AND DEFENDANT.

The trial of the case moved more swiftly than counsel for the defendant had anticipated as there was no cross-examination at all of the defendant. Defendant had made arrangements for two physicians to appear later in the afternoon to give testimony. When they were not there at the close of the examination of the defendant, defendant's counsel requested a short recess in order to get them there (89). The Court denied this continuance, not on the ground that time was a factor because it was then only midafternoon and the Court had no other matters scheduled for that day, but on the ground that the testimony of the doctors would be immaterial (92).

As was shown in the statement which constituted an offer of proof as to what the doctors would testify, the defendant would have shown by these doctors that the plaintiff had twice attempted suicide. Once while plaintiff and defendant were residing together and the second time after the defendant had left for army duty and the plaintiff had not even seen him for a period of two months. The plaintiff on cross-examination had admitted certain facts surrounding the two instances to

which the doctors would have testified, but denied that there was any suicidal intent at either time. The doctors would have testified that the intention to commit suicide had been expressed to them by the defendant. The court held that this was immaterial. It is the position of the defendant that this testimony was highly material as set forth in the argument under the preceding point.

Defendant was also prepared to call President E. Wesley Smith of the Hawaiian Islands for the purpose of refuting the testimony of the plaintiff regarding the circumstances under which the marriage had taken place. The defendant felt and still feels that this testimony was relevant and for the reasons set forth in the argument under Point One. The Court, however, held that President Smith's testimony would be of no value and refused to allow the defendant to call him. These actions on the part of the Court constituted obvious error to the prejudice of the defendant.

POINT FOUR

THE COURT ERRED IN GRANTING A DIVORCE TO THE PLAINTIFF FOR THE REASON THAT THERE WAS INSUFFICIENT EVIDENCE TO WARRANT A FINDING OF CRUELTY.

This case presents for determination three questions:

- (a) Is incompatibility grounds for a divorce in the State of Utah?
- (b) Can a person secure a divorce merely because he no longer loves his spouse and wishes to be divorced?

- (c) May a person by their own misconduct deliberately goad the other party to a marriage to excesses of language or conduct and then assign such excesses as cause for divorce?

The Trial Court is of the opinion that this Court by judicial legislation has made incompatibility grounds for divorce in this state, and stated so clearly during discussion with counsel at the time the Court was announcing its decision (93). The Court went on to say, "I was surprised at that case" (96). The Court nevertheless proceeded to grant the divorce merely because plaintiff wanted it and testified that she did not love the defendant, could not get along with him and desired to be divorced. Although the Trial Court did not identify by name the case on which reliance was placed, reference was evidently made to the case of *Hendricks v. Hendricks*, Ut., 257, Pac. (2d) 366. Counsel does not understand that this Court in the *Hendricks* case decided any such thing as Judge Jeppson apparently felt was decided. The Court did not in the *Hendricks* case decide that incompatibility was grounds for divorce, but rather held that recrimination is not necessarily a defense to a divorce action. In the *Hendricks* case, both parties were seeking the divorce, neither one wanted to continue the marriage relationship, both of them wanted to rid themselves of the rights and obligations which had been acquired by the marriage ceremony. Both of them were guilty of conduct against the other which would constitute, under the statutes of the State of Utah, grounds for divorce. The only question there involved was whether or not when grounds for divorce exist on each side where both parties wanted a divorce, the Court itself should determine as a matter of public policy

that it should grant no divorce at all. The Court determined that it would not refuse to grant a divorce under such circumstances, that where grounds for divorce existed public policy did not require two people to live together where both of them were struggling to rid themselves of the marriage. In this case we have no such situation. In this case we have the party guilty of the greater wrong, the party guilty of the grounds for divorce, if there were any, attempting to secure a divorce from the wronged party, who, in spite of the situation that prevailed desired to effect a reconciliation and continue the marriage relationship. To permit a divorce under such circumstances would be to make a sham of the marriage contract and to permit a person to be relieved thereof because of her own wrong and not because of the wrong of the other party.

The Trial Court recognized, as would have to be recognized by any impartial observer, that whatever intemperence of speech or conduct defendant might have exhibited, resulted directly from the abuses which he had accepted from the plaintiff. The Court stated (97-98):

"Now if you get a neurotic person, it is almost impossible to live harmoniously with them. * * * Now because it is hard, the person is driven to conduct which would justify a divorce. They do not realize that the neurotic condition is the basis, and they don't have the sympathy. It is pretty hard to do it. We cannot always administer what these doctors call a therapy that would help a nervous person. They get irritated instead. I would and you would, we all do."

He went on to say on page 106:

"There are things the plaintiff ought to consider in this case, and that is, that where you are overly sen-

sitive and nervous, it makes it very difficult for the persons around you to get along, where they are not skilled in that field, and they just have to talk the way they feel."

He further stated on page 105 of the record:

"In the ordinary families the amount of cruelty they had in this case, should and could be overruled." (the word "overruled" appears to be a typographical error and should read "overlooked.")

In determining where the fault lay, the Court said (Tr. 96):

"The Court does not say it is all on one side, it might be just about even."

The statement of the Court that the fault is just about even does not appear to be borne out by the evidence, even taken in the light most favorable to the plaintiff. It is true that she testified that the defendant had struck her on two occasions, but after that she continued to live with him as his wife for some four years without a repetition of the offense and certainly those actions, even though the evidence discloses considerable provocation therefor, were completely condoned. If we are to believe, at face value, the testimony of the plaintiff as given in this case, the situation is this: We have a woman who did not want a husband, but who wanted a family. She became acquainted with a widower, who already had a child that she desired to have as her own. Then, although she did not love the man she married him. Sexual relationship was distasteful to her. After the first sex act, her indifference turned to hate. Notwithstanding that she went along with the sham of the marriage until she had adopted the child. Then, not satisfied with that, desiring to be a natural mother, she con-

tinued to live in a marriage relationship with a man she hated, undergoing extensive medical and surgical treatment to make herself fertile. She continued with this sham until she conceived and bore a child. Then, having what she had wanted in the first place from the marriage relationship, she seeks to cast aside the man who made it possible, cutting him off from normal relationship, not only with his wife, whom he testified he still loved in spite of what had happened, but also from his natural children whom as a father he naturally loved.

It is the position of the defendant that this is not a true picture of what gave rise to the difficulties in this marriage. The evidence is unmistakable that the plaintiff is a highly neurotic woman and that the defendant had a great deal to put up with. It may well be that the mental condition of the plaintiff caused Mr. Fahey considerable aggravation at times; however, the evidence in the record, as well as the exhibits that were offered and refused, establish that Mrs. Fahey did love her husband at the time she married him and did continue to love him until the time that her mother came down to live near the couple. Exhibit 4, which was received in evidence, is a letter written some five years after the marriage in which she still expressed her love for her husband, and Exhibit 5 was written only about one year before the divorce action. The rather subtle hand of the plaintiff's mother is plainly evident in the disruption of this marriage. It was not until she came to Salt Lake that the trouble became really serious. It was she who carried the details of the alleged abuse of Susan which allegedly lead to the final break, and it was she who thwarted all attempts at reconciliation.

The defendant appealed to the authorities of the Church to which they both belonged in an effort to bring about a reconciliation. Exhibit 16, which was offered but rejected, is evidence of these attempts. At his instigation, Pres. Joseph Fielding Smith called a meeting between the parties. However, when the plaintiff appeared, rather than appearing alone, she appeared with her mother, who proceeded to scuttle all attempts at reconciliation. The mother testified that she went to this meeting at the request of her daughter (70). The plaintiff, on the other hand, previously testified, while the mother was excluded from the court room, that she did not request her mother to go, but that it was her mother's own idea to go along (160).

This is not an irreconcilable cleft; it is one which would be readily reconciled if this divorce were denied and the parties left to their own devices rather than subject to the pressure of an overly-possessive mother of one of the parties. Certainly public policy does not require the granting of a divorce on sham or even on very slim grounds in a situation such as this.

The public policy in this regard was very well set forth by this Court in *Cordner v. Cordner*, 94 Ut. 466, 61 Pac. (2d) 601, in the following words:

"The marriage covenant creates a status not lightly to be regarded. It is presumed that before a man and a woman marry they have wisely, carefully, discreetly, and reverently considered the matter. The institution of marriage is a sacred one protected by the law, fostered by religion, and maintained and encouraged by organized society. Once entered into, good cause for separation must be alleged and proved before the covenant may be set aside."

In the case of Hyrup v. Hyrup, 66 Ut. 580; 245 Pac. 335, the Court set aside a Decree of Divorce holding: "We think the evidence of the wife's conduct in this case fails to establish legal cruelty." The Court then went on to quote from the case of Doe v. Doe, 158 Pac. 781, 48 Ut. 200, to the effect that the courts would grant a divorce for cruelty to a wife in much less aggravated cases than would be required to grant a husband a divorce from the wife. This perhaps is sound policy although the reasoning behind it has been somewhat tempered since that time by the emancipated social status of women. However, even so, this Court or any other Court having cruelty as grounds for divorce has never gone so far as to say that a wife may secure a divorce under circumstances where her husband's conduct is nothing more than the normal and natural conduct of the man to misconduct on the part of the wife.

In the case of Lundgreen v. Lundgreen, 184 Pac. (2d) 670, the husband sought a divorce from his wife on the grounds of constant quarreling and bickering. The Court did sustain the Decree awarded to the husband in that case, but stated:

"If these parties were younger, we might hesitate to sustain the decree. However, in this case both parties are over 70. They are rapidly approaching the time when they will be solely dependent physically as well as financially. Acts and remarks which would usually not irritate people much younger, have annoyed these people because of ill-health and difficulties in hearing. Their inability to adjust, their lack of cooperation, their old-age and utter financial dependency, have tended to magnify the irritation over the conduct of each other."

Here we have no such situation. Here we have a couple in their thirties, still bearing children. The couple was getting along well financially. As the trial judge pointed out, such conduct as is here at issue should be overlooked. The defendant since the couple separated has shown every desire to reconcile. He has made efforts which without doubt, if not interfered with by the mother-in-law, would have been successful. Good public policy demands that the Court here recognize the sanctity of the marriage contract by refusing a divorce and by leaving the couple to work out their problems in a more natural way. Under the circumstances, if the Decree were affirmed the defendant would be punished for something that was not his fault. The Court would, thereby, be furthering the designs and schemes of an overly possessive woman, who, having lost her husband and having only recently married a man much older, attempts to grasp at her daughter and her daughter's family by systematically brain-washing them against their husband and father.

POINT FIVE

THE PROPERTY SETTLEMENT ORDERED BY THE COURT IS INEQUITABLE AND UNJUST.

The Court in effect awarded to the plaintiff in this case all of the property which the plaintiff and defendant had acquired over the years of their married life. The defendant did not at the trial and does not now complain about the amount of support money. So long as the children are living with the mother alone and dependant upon her for support, he feels that the amount is fair and reasonable as he wants the

children well taken care of. However, he does complain of the fact that he salvaged nothing out of the marriage. The automobile was awarded to the plaintiff; all of the furniture in the home, with the exception of a small equity in a deep-freeze, was awarded to the plaintiff. The plaintiff was awarded the right to live in the home in which the couple had approximately a \$5000.00 equity. It is true that the Court stated that if the property were ever sold the defendant should receive one-half of the equity realized, provided, however, that the plaintiff should first be paid back all payments which she made on the property including interest, and interest on the interest. It is evident, therefore, that any award to the defendant in that case is an illusory as his equity would be entirely consumed in a period of two or three years by this provision.

As the matter stands, he is left without a home, without property, without a wife and with his children being weaned away from him by a mother-in-law who has already succeeded in wrecking his marriage. Certainly a Court of equity cannot sanction this situation.

Respectfully submitted,

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